

Respecting the principle of best interests of the child in Canadian monitoring

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Résumé de l'article

Cette étude traite de la relation entre les questions de procédure de surveillance des droits des enfants à l'échelle internationale et le principe général de l'intérêt supérieur de l'enfant. Le Canada emploie des processus de surveillance qui déterminent l'état des droits des enfants en fonction du concept de l'intérêt supérieur de l'enfant. Or, l'argument invoqué est que, malgré la place centrale que devrait occuper le principe d'intérêt supérieur dans le processus de surveillance, de nombreux intervenants du Canada et leurs procédures continuent de refléter leurs propres priorités, préoccupations ou autorité. Ils outrepassent ainsi leur mandat sous prétexte qu'ils sont plus avisés ou qu'ils possèdent l'autorité voulue pour le faire. Cette approche reflète la théorie traditionnelle désuète du principe de l'intérêt supérieur de l'enfant. En revanche, pour qu'il évolue et que la surveillance repose et soit axée sur les droits des enfants, le principe d'intérêt supérieur dans l'optique du droit des enfants requiert une reconnaissance, une réorientation et un engagement. Les conclusions renferment plusieurs recommandations pour faire évoluer le principe d'intérêt supérieur dans un contexte de surveillance.

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Abstract

This paper considers the relationship between the procedural concern of monitoring international child rights and the general principle of best interests of the child. Canadian monitoring processes to determine the situation of child rights are analysed using the best interests principle as a lens. It is argued that despite the importance of the best interests principle in relation to monitoring, many Canadian actors or processes continue to reflect their priorities, preoccupations or authority—despite their limitations—because they know best or have authority to do so. This approach mirrors the traditional, outdated understanding of best interests of the child principle. In contrast, the best interests of the child principle in child rights sense demands recognition, reorientation and commitment to progress so that monitoring is guided and influenced by child rights. The paper concludes with a number of recommendations to advance the best interests principle in monitoring.

Résumé

Cette étude traite de la relation entre les questions de procédure de surveillance des droits des enfants à l'échelle internationale et le principe général de l'intérêt supérieur de l'enfant. Le Canada emploie des processus de surveillance qui déterminent l'état des droits des enfants en fonction du concept de l'intérêt supérieur de l'enfant. Or, l'argument invoqué est que, malgré la place centrale que devrait occuper le principe d'intérêt supérieur dans le processus de surveillance, de nombreux intervenants du Canada et leurs procédures continuent de refléter leurs propres priorités, préoccupations ou autorité. Ils outrepassent ainsi leur mandat sous prétexte qu'ils sont plus avisés ou qu'ils possèdent l'autorité voulue pour le faire. Cette approche reflète la théorie traditionnelle désuète du principe de l'intérêt supérieur de l'enfant. En revanche, pour qu'il évolue et que la surveillance repose et soit axée sur les droits des enfants, le principe d'intérêt supérieur dans l'optique du droit des enfants requiert une reconnaissance, une réorientation et un engagement. Les conclusions renferment plusieurs recommandations pour faire évoluer le principe d'intérêt supérieur dans un contexte de surveillance.

Introduction

The provision of child rights in international law confirms their role and importance. A number of challenges remain however, in terms of their understanding and implementation. Following its two considerations of Canada's progress in implementing the Convention on the Rights of the Child (CRC)

(UN, 1989), the United Nations Committee on the Rights of the Child (UNCRC) recommended, *inter alia*, that Canada, not only strengthen monitoring efforts, but also advance and appropriately analyze the best interests of the child principle in relation to individual and groups of children in various situations (UNCRC, 1995 3, 4; 2003 3, 6). Consequently, this paper considers the relationship between the procedural concern of monitoring and the general principle of best interests of the child.

Monitoring determines the situation of child rights and involves collection, assessment and reporting of the details (Collins, 2008a 6). Research illustrates that various international, national and regional actors and procedures contribute to monitoring, which not only provides information about child rights, but also supports the commitments and the possibility of progress (Collins, 2005). Monitoring is deemed essential and hence, CRC article 44 requires States parties to regularly report to the UNCRC so that it may assess “the degree of fulfilment of the obligations...”(UN, 1989). National level monitoring activities and institutions are particularly important as Alston and Tobin explain:

No matter how well the UN Committee on the Rights of the Child might function, no matter how effective and active international agencies such as UNICEF or the World Bank might be and no matter how active and dedicated civil society might be, the real litmus test of accountability will lie in the quality of the domestic institutional arrangements for ensuring that the national and local levels of government, as well as other key actors, are accountable for any failures which might have been avoided to ensure respect for the rights of children.”

Monitoring should be a participatory process as per CRC article 45(a) involving UN actors and “other competent bodies”. At the national level, monitoring can involve the activities and results from: executive and legislative monitors, independent commissions or actors, academics, news media, NGO/voluntary sector, and international monitoring (Collins, 2008a). The judiciary is not a monitor but it interprets and assesses child rights; and case law illustrates the influence of child rights. Hence, there is much monitoring activity involving various actors within states. Such monitoring offers important insight about the status and progress in child rights implementation. However, the means to accomplish this objective can vary (Collins, 2008b 159).

The process of monitoring to date inadequately illuminates the situation of the child and his/her rights because, despite the international legal commitment, child rights still have not inspired or influenced the monitoring process (Collins, 2005). This is revealed in the following consideration of the best interests principle. In addition to establishing standards for children,

international child rights law not only establishes standards for children, but should also influence all processes related to children (Collins, 2008a 13).

Despite the importance of the best interests principle in relation to monitoring child rights, many actors or processes in Canadian monitoring reflect their priorities, preoccupations or authority — despite their limitations — because they feel they know best or have authority to do so. This approach mirrors the traditional, outdated understanding of best interests of the child principle. In contrast, the best interests of the child principle in the sense of child rights demands recognition, reorientation and commitment to a process of evolution so that monitoring is guided and influenced by child rights.

This paper first presents the approach to the principle of best interests of the child. It then identifies some difficulties in Canadian monitoring before addressing how the best interests principle, as part of a rights-based approach, redresses them. Following this, the paper considers some lessons from the international level relevant to the best interests principle and the Canadian context. Lastly, the paper discusses some means of improving implementation of the best interests principle in Canada's monitoring.

Approach to the Best Interests Principle

The CRC provides the best interests principle in article 3. This paper will focus on the first paragraph, which enunciates:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 3 is of such fundamental importance that the UN Committee has designated it a “general principle”.² As such, this provision, in addition to being implemented, should be viewed as particularly relevant in the implementation of all other CRC rights.

The principle is complex, particularly since it has been utilized in domestic courts over numerous decades, usually in relation to family law. In light of its inclusion in the CRC, its interpretation should be adapted to reflect the framework of child rights. Alston explains:

[T]he ways in which the Convention has both formulated and situated the principle should eventually result in the need for those domestic courts which seek to apply the Convention to adopt a rather different approach from that which they themselves have hitherto developed, primarily within the limited context of custody decisions. (1994b 17)

However, the interpretation and understanding of this principle continue to be problematic as has been described by the (Canadian Coalition for the Rights of Children):

While there is not a fundamental conflict between parental rights and the rights of children, there are tensions between them, often resulting from different perspectives on what is in the best interests of children. In general, this understanding of the relationship between the rights of parents and the rights of children is upheld in Canadian law and Supreme Court decisions. There is a lack of consistency in individual decisions and need for clarification in various pieces of legislation, policies, and practice. (2009a 17)

Consequently, there are a number of criticisms of, and questions about this principle (Alston and Gilmour-Walsh, 1996).

In an attempt to identify these issues, this paper considers the relevance of this principle within the framework of the child rights in relation to monitoring children's rights. The best interests principle requires that monitoring should centre around the child, who must be considered as an independent person, not to be ignored or excluded in matters that concern her/him (Collins, 2005 19). No matter his/her age, the child has contributions to make in all matters, including monitoring. Indeed, the behaviour and level of development of an infant aged 0-2 years can provide valuable information, before the child can communicate in more traditional interactions with others (Garbarino and Stott, 23, 154).

Current Challenges in Canadian Monitoring Efforts

Despite the CRC commitment to the best interests principle, Canadian monitoring is challenged by several factors that inhibit the application of the principle in the process. These difficulties in monitoring include: Canada's federal system; restricted participation; the dichotomy between government and civil society; the lack of, or limited resources; the focus of monitoring; and the role of the adult in relation to the child.

Federal system

Effective monitoring of child rights is challenged by the different levels of government and the distribution of responsibilities among the federal, provincial and municipal governments. For instance, the Government of Canada's reports to the UNCRC have to date only collated contributions from the federal, provincial and territorial governments (Canada 1994; 2001; 2009). While this traditional approach to international reporting reflects governmental structures, the organization inhibits an understanding of the situation of children or their rights (Collins, 2005 154). Consequently, the

Standing Senate Committee on Human Rights highlighted the absence of a “coordinating mechanism to bring research together to create a national portrait of children in Canada” (Senate of Canada, 2007 223). Indeed, focusing on institutions may provide useful information about the nature and scope of the establishment but not necessarily about the child (Wintersberger xiii). Even if institutional data consider the child, the results are inherently restricted by the understanding of the context, and cannot accurately and comprehensively illustrate the child rights situation (Collins, 2005 2). While institutions are generally responsible for monitoring, the child cannot and should not be defined by a particular institution. Thus, the lack of monitoring focus on the child in the federal framework inhibits the best interests principle.

Restricted Participation in relation to International Human Rights

The commitment to the child’s best interests is hindered by the restricted role and influence of international human rights law in Canada as evidenced in the degree of participation in various related processes. For example, Parliament is an essential element of Canadian democracy but it has historically not been involved in negotiating, signing and ratifying international human rights treaties. Moreover, there is no constitutional requirement for parliamentary approval or study (Senate of Canada, 2005 38). (These roles are carried out at the executive level of the federal government.) As discussed below, there is a lack of CRC awareness. Furthermore, communities and provinces are often disconnected from national monitoring efforts (Collins, 2005 201). How can the population or groups demand improved efforts when monitoring, the CRC, and the responsibility to report to international monitors are not well known? Furthermore, while there are some rare exceptions, including the earlier work of Save the Children (2001) for example, children are not engaged in the process even though it is their right to participate as per article 12 of the CRC, and they would contribute to monitoring. The UNCRC recognises the fundamental importance of the right of children to participate in deeming this provision a general principle of the CRC: ‘... which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights’ (2009, 5). This limited participation inhibits the application of the best interests principle and monitoring.

Government versus Non-Governmental Organizations (NGOs)

There is a clear dichotomy between government and NGOs categorized in familiar language as “the other side” despite the fact that both are often interested in the same objectives related to children, including their best interests. This distinction is particularly apparent in reference to CRC awareness and respect. While there are some excellent exceptions, some public servants are uninformed and apparently uncommitted to child rights as evidenced by the resistance of officials to invoke the CRC in their efforts or proposals (Dudding

and Phaneuf, cited in Pearson and Collins 41). Moreover, the different roles of government and NGOs in society perpetuate the division in relation to monitoring as government agencies may use the results to justify measures rather than view this process as an opportunity to assess the situation (Collins, 2008 164). Hence, NGOs can make important contributions in advancing child rights (Pearson and Collins 42-3). But NGO monitoring can also be limited, where results must serve on advocacy concerns (Collins, 2008b 161). This categorization also illustrates another gap in our understanding because there are other relevant monitoring processes concerned with children. Other members of civil society, including professional associations, academia and children themselves play important roles in ascertaining the status of child rights. The research of various academics in various disciplines, across the country, as well as multidisciplinary efforts, may also illustrate the situation of children but as discussed below, may not necessarily child rights. The scope of activity reflects different roles and approaches with respect to interpreting rights, describing and assessing the situation (Collins, 2008b) as well as to commitment to the best interests principle.

Limited Lack of Resources

The impact of limited or lack of resources hinders efforts to respect the obligation to monitor. It is an unremitting issue at all levels; there is a need for a regular budget for children's rights monitoring at the UN, as well as at regional and national levels. Presently, monitors are impeded from effectively meeting their objectives due to the absence of regular and consistent funding of their work (Collins, 2005). But as Himes (9) points out, such resources include more than financial support; they also include organizational, human and technical resources to facilitate, develop and sustain efforts. Research has shown that funding issues what tensions translate into inadequate staffing, institutional overload and overworked staff, which, in the end affects the scope and quality of the work (Collins, 2005 285-286). While provincial officials may be interested, treaty reporting is only one of many tasks, restricting impact, so that some non-governmental actors believe that there is little government interest and that the results merely reflect the understanding that every few years, "people would get a little bit busy" (Griffin, 2002). The addition of better resources would significantly improve monitoring. The child's best interests principle demands dedicated commitment to children and to assessing the state of their rights.

Focus of Monitoring

Monitoring children is not necessarily achieved through processes designed to address child rights. Research focusing on the well-being or the needs of children is not rights-based since the child continues to be viewed as the object, rather than as the subject of the research. A rights-based approach is based on obligation and responsibility whereas a needs-based approach is one of

charity, involving choice as to whether the need is addressed or not. It demands understanding the various causes preventing rights enjoyment (UNICEF, qtd. in Collins et al, 2002 2), an understanding necessary for comprehensive monitoring. Hence, the child's reality is not completely understood and his/her rights are not respected. (Wintersberger xiii). Some Canadian non-governmental actors are apprehensive to use rights language in advocacy because they believe the government will not respond to it (Griffin, 2002). In general, there is weak understanding of international rights law in Canada due to lack of experience, education, training, a situation exacerbated by Canada's dual legal tradition, which tends to diminish the role of international law (Collins, 2005 224). Some actors who find it difficult to operationalise and monitor children's rights because rights seem too abstract, believe that monitoring children's interests may be more realistic (Glossop). Consequently, many monitors follow a needs-based, rather than a rights-based approach in detailing children's situations (Collins, 2005 225). For example, the work of the Canadian Council of Social Development (2006), in assessing the progress of Canada's children, considers obesity rates rather than the right to health. Further, a draft Human Rights Report Card prepared by the Canadian Human Rights Commission stated that Canada's international human rights obligations are an inspiration, however there is concern about the lack of connection between the rationale and the proposed report card/indicators because the framework, indicators and data sources appear to better reflect discrimination than human rights (Collins, 2009). Thus, international legal commitments are insufficiently reflected in research and the spectrum and content of the child's economic, social, cultural, civil and political rights as enunciated in the CRC and other instruments, including best interests, are not fully appreciated.

Role of the adult or parent related to the child

The adult or parent is the primary determinant of most existing monitoring about children. Wintersberger has found that research about children is influenced by adult preoccupations, priorities, or prejudices, determining what and how information is collected, analysed and reported (qtd. in Collins, 2005). While adult perspectives are valuable, they should not exclusively define our understanding of the child's situation. Indeed, the Supreme Court of Canada came to this conclusion in *Eaton* (1997), an otherwise controversial case about the right to education of children with disabilities.³ Hence, Toope states that the "best interests' of children may not be what parents think they are"(48). The overwhelming monitoring role of adults poses a challenge: How can the right of the child to participate as per CRC article 12 be respected and supported?

Impact of these Conflicts and Difficulties

The aforementioned difficulties contribute to the interrelated problems in Canada, namely the lack of CRC awareness and influence, which result in limiting the approach and the responses to the best interests of the child and to monitoring of child rights.

The lack of attention paid to the best interests principle and to monitoring perpetuates a general lack of CRC awareness in the country. Cross-national surveys have repeatedly revealed a lack of knowledge about the CRC (Covell 2). For example, a 2005 Ipsos-Reid survey found a majority of Canadians (61%) believed that children's rights are already fully implemented in the country while only 46% of those surveyed were even aware of the CRC (qtd. in Howe and Covell 407). Another survey of 801 British Columbians over the age of 18 from across the province revealed that 52% of the population knows very little or nothing at all about children's rights. 86% of those surveyed "strongly or moderately agreed that the public needs more information about child rights in BC" (SCY-BC et al. 2006). This absence of CRC awareness is problematic since Canada is required under article 42 of the CRC "to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike" The problem is exacerbated by insufficient child rights education in Canadian schools (Pearson and Collins 40). While some civil societal actors, including children themselves, make valuable education and training efforts (Pearson and Collins 42-3), this lack of awareness on the part of government, Parliament and the general public (Senate, 2007 195), means that few individuals appreciate the requirements and significance of the best interests principle and of monitoring.

Moreover, the absence of CRC appreciation means that, although there are some encouraging efforts, generally, a lack of CRC grounding continues in Canadian law, policy and practice (Pearson and Collins, 2009). This absence of CRC influence in policy and practice in relation to monitoring is evidenced in the lack of a Canadian response to the UN Committee's previous recommendations to Canada, a fact that is particularly perplexing to the advocacy community (See Canadian Coalition for the Rights of Children 2009b). Further concerns stem from the fact that the Government of Canada's combined third and fourth report submitted to the UN Committee on November 20, 2009 was almost a year late (Canada 2009) and the absence of civil societal engagement or consultation in the process of its development. In sum, these problems reveal the lack of CRC influence in Canadian monitoring, which runs counter to our international treaty obligations.

Monitoring involves fundamental choices about procedures, objectives, and content. (Collins, 2008a 10) In Canadian monitoring however, it is clear that the best interests principle is not a priority. As discussed above, many actors or processes continue to reflect specific priorities, preoccupations or

authority—despite their limitations—because those involved perceive themselves to be the experts and they have the necessary power base. Hence, they mirror the traditional understanding of best interests of the child principle in the old-fashioned sense where authorities, simply because they have the prerogative, know best about monitoring just as a father has traditionally decided what is best for his child. Evidence of this approach can be found in the Government of Canada’s CRC reports as well as in some other efforts designed to address the situation of children but which do not actually identify or discuss their rights. These initiatives reflect minimal effort and understanding of child rights including the best interests principle. Consequently, there continues to be a lack of adequate resonance, revealing the outdated status of the best interests principle and the weaknesses of current monitoring in Canada.

Resolving these Difficulties through a renewed rights-based approach to best interests

Instead of the traditional, paternalistic manner, a rights-based approach to the best interests principle can redress the various difficulties and conflicts in monitoring.

Since the end of World War II, human rights have gained increasing attention and influence in international affairs and law. Since its establishment, the United Nations has included the global goal of human rights in several international instruments including the international covenants on economic, social and cultural rights, and on civil and political rights (1966), and more recently the CRC (1989). Such regional organizations as the Council of Europe, Organization of American States and the African Union have also produced various human rights instruments. The preamble of the Universal Declaration of Human Rights (1948) identifies the essential goal of human rights, which is to recognize the inherent dignity and the equal and inalienable rights of every member of the human family. To this end, a human rights-based approach aims to realize rights as provided in international law. Chinkin (2001, 25) explains that the approach legitimizes claims, allowing “progress to be measured against objective standards and upholds the state’s international obligations (25).” A human rights approach to international development has gained currency, influencing methods and programming rationales of organizations including UNICEF (2001). Rights evoke efforts, as Jebb explained in 1922, along “constructive rather than charitable lines” (qtd. in Save the Children, 2001 5). Accordingly, rights should involve responses to established legal obligations and duties to human beings. There are two principal motivations that generally support rights-based approaches according to the Office of the High Commissioner for Human Rights (2006): the intrinsic rationale, which recognises that the effort(s) are correct morally and/or legally; and the instrumental rationale, which acknowledges that the activity supports more effective and improved responses in respecting rights.

A human rights approach also inspires a child rights-based approach. Due to the international legal recognition and universal relevance, international child rights laws offer a vision and reflect a standard to be understood and respected in all efforts related to, and involving children. A relevant measure of their significance is whether child rights monitoring reflects and respects the rights of the child. A child rights-based approach centres efforts, including monitoring, around the child and respects the indivisibility of the child's rights. For example, CRC's article 4 states that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention." While the CRC's monitoring provisions in articles 43 to 45 do not specifically require consideration of child rights, they do stipulate/suggest that, for child rights to be respected in accordance with the general principles, monitoring should not be discriminatory, it should serve the child's best interests, foster the "survival and development of the child", and the child has the right to express his or her views in "all matters affecting the child". Thus, comprehensive implementation of child rights must also include respecting these rights in the process of monitoring them.

Hence, a child rights-based approach to monitoring would advance better respect of rights in the process and also lead to more effective results. Such an approach would not only consider protection but other rights of the child including child participation. Furthermore, a rights-based approach acknowledges and advances the comprehensive obligation to respect rights in processes and results.

To this end, attention to the best interests principle contributes to monitoring by ensuring a focus on the child, not only the authority, legislation, actor, and so on. The differing needs or priorities of children, their caregivers, and their governments and others must be reconciled. While an authority or expert may have much knowledge to bear, if relied upon exclusively, this undertaking will only reflect the traditional best interests approach and cannot be comprehensive. Child rights demand a fuller, more comprehensive understanding in both the process and results of monitoring.

Indeed, children involved in focus groups as part of the research process had clear understandings of monitoring (qtd. in Collins 2008a, 6):

To find out if children understand their rights; to find out children's views and beliefs; to find out if there is any problem in their groups and areas; to monitor the children's health and well-being.

VV. (12 year-old girl), M. (12 year-old boy),
and G. (17 year-old boy), Cape Town

To get accurate information from the parties involved and to have proof that directives [of the CRC] are being followed. If those involved are saying something, in this case the children, they might have a different opinion. That is why monitoring is important, to show that they do think otherwise than what they are being told. To get many diverse opinions.

TA. & RJ. (13 year-old boys), Ottawa

These quotations indicate that an important means to support a rights-based approach is to include the child in order to respect his/her best interests.

Accordingly, while the CRC's article 3(1) identifies that best interests may be "a" "primary consideration" "in all actions concerning children", it is not meant to be an excuse for lesser commitment to facilitate actors to dismiss, disregard or ignore child rights. This phrasing allows for consideration of all relevant concerns and rights. Best interests should be considered along with other child rights principles and rights. Thus, monitoring should not be hindered to the extent that it is by funding restrictions, jurisdictional limitations, acting in a "father-knows-best" manner towards the collection, analysis and reporting of data.

Respect and implementation of the best interests of the child principle in the child rights sense is necessary because without it, Canada's monitoring will not progress.

What does the international level offer to the Canadian context?

International developments offer both positive and negative contributions to advancing best interests in the Canadian context.

Negative examples

The best interests principle is hampered by fragmentation and the protection-focussed approach of some actors at the international level. The fragmentation of the actors and their efforts pose a difficulty at international and regional levels weaken monitoring and obstruct the best interests principle. For example, the number of international monitors with relevance to child rights is almost dizzying. In addition to the UNCRC, examples include: seven other UN treaty bodies; the UN's Human Rights Council, its Universal Periodic Review process, and its various special procedures involving thirty thematic procedures and eight country procedures including special rapporteurs, independent experts, and working groups (OHCHR, 2008). Despite some attempts to redress the problem, their efforts are hampered by weak coordination. Monitors would benefit from efficacious, rather than superficial, coordination and information-sharing, which would not only provide more data for better comprehension, but it also would likely achieve

stronger results, and benefit best interests of the child at both the international and domestic levels.

Furthermore, while general human rights actors are important monitors, they do not consistently interpret or advance the rights of the child in a comprehensive, holistic manner. Even with greater awareness of child rights over time, several efforts of the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights provide examples of a restricted protection-focussed approach to children and their rights (Collins, 2005, 36-39). In general, these experiences reveal the challenge posed by child rights to overcome the traditional understanding of the best interests principle in their work, as well as illustrate the important role of specific child rights monitoring.

In sum, the negative impacts of fragmentation and a protection-focus provide useful points of reference for Canadian monitoring.

Positive Examples

Valuable lessons from international monitoring and adjudication also contribute to advancing best interests. Canada should consider for example, the Advisory Opinion on the “legal status and human rights of the child” from the Inter-American Court of Human Rights, which recognizes that this “regulating principle regarding children’s rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child” (para. 56). This understanding does not reflect the traditional, limited understanding of the principle and rather, explicitly identifies the requirement of a “dynamic interpretation” of the American Convention’s requirement for child protection, which reflects the “new circumstances on which it will be projected and one that addresses the needs of the child as a true legal person, and not just as an object of protection” (para. 28). Thus, the Court supports an appropriate understanding of the best interests principle and its requirement of balancing and proportionality to resolve conflicts.

The Supreme Court of Canada illuminates another dimension of the best interests principle in the *Baker* (1999) decision, which is the first Canadian Supreme Court cases referring to the CRC. According to the Court,

...the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. ... However, where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable. (864, para.75)

While this conclusion is valuable, there is still room to improve child rights in Canadian adjudication.

Comparing two cases about corporal punishment in South Africa and Canada offers useful instruction about a child rights approach to the best interests principle. While Canadian courts to date are not yet prepared to do so, South Africa's obligations to children and their rights including best interests figured prominently in the Constitutional Court's reasoning in *Christian Education* (2000, 37, para. 53). In addition to considering constitutional obligations to reduce violence, the Court refers to the CRC obligation to protect the child and acknowledged: "It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right which every child has. The principle is not excluded in cases where the religious rights of the parent are involved" (27, para. 41). This recognition of child rights, not simply concern about religious freedoms of adults, is significant given the current adjudication of criminal charges against two polygamist leaders from Bountiful, British Columbia, where numerous children are adversely affected and while they may be identified, they are often ignored in such examinations of the situation as for example, Matas and Stueck (2009). With respect to child representation in adjudication in the Canadian case about corporal punishment, McLachlin C.J. argued that: "The child's interests are represented at trial by the Crown. ... Nor is there any reason to conclude on the arguments before us that providing separate representation for the child is either necessary or useful." (*Canadian Foundation*, 2004, 27, para. 41) This position contrasts with the South African *Christian Education*, which specifically identified the child's voice and that it was "unfortunate" a *curator ad litem* had not been appointed to represent children in the case; because according to Sachs J: "Their actual experiences and opinions...would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure" (37, para. 53). While the legal commitments to child rights differ, the South African example offers valuable insight to the influence of child rights, including child views in understanding best interests, as guided not only by the CRC but also the potential of a constitutional commitment to child rights (South Africa).

In conclusion, Canada should consider these various positive and negative lessons in order to improve its approach to the best interests principle and to child rights in CRC monitoring.

How to improve implementation of best interests in Canadian monitoring?

The various difficulties discussed above cannot be used as justification not to respect and respond to demands of monitoring or child rights. In terms of solutions and policy considerations, there are some valuable good practices and requirements to support the importance of reflecting the appropriate meaning of, and approach to the best interests of the child principle.

Establish an office for an independent national children's commissioner

The best interests principle in Canadian monitoring would be advanced with the appointment of an independent federal children's commissioner who would be mandated to hear children's views, advocate and ensure respect of child rights in federal affairs, as well as monitor the situation of children and their rights in Canada. Provincial child and youth advocates have consistently called for a federal commissioner due to the absence of advocacy at the federal level and the fragmentation of service provision for children across the country (Pearson and Collins, Ch. 6). The Standing Senate Committee on Human Rights also recommends that this Office report annually to Parliament (Senate of Canada, 2007, 214). The Government of Canada's lackluster response to the Standing Senate Committee's report is not encouraging (Canada 2007). Hence, it remains to be seen whether Canada will support the best interests principle in this important direction of monitoring and advocacy.

Enabling legislation to advance CRC implementation

In order to better advance the CRC, enabling legislation would not only support CRC implementation but also give greater weight to monitoring. The Standing Senate Committee on Human Rights also recommends that ratification be accompanied by "enabling legislation in which the federal government considers itself legally bound by its international human rights commitments" (Senate 2005, 85). This is an important recommendation to advance CRC awareness and respect and in the Standing Senate Committee's words would "to ensure cooperation, coordination, and compliance with Canada's international obligations at all levels of government" (2005, 85). Such enabling legislation would assist the realization of the child's best interests and other child rights and also advance Canadian monitoring.

Respect across jurisdictions and authorities of Jordan's Principle

An important contribution to the advancement of the best interests principle would be through attention to, and active support of Jordan's Principle as a monitoring concern.

Similar to the best interests principle where attention and priority must focus on the child, Jordan's Principle demands the same consideration.

The principle is inspired by the experiences of Jordan, a young Aboriginal boy who was born on the Norway House Cree Nation reserve in northern Manitoba in 1999 with special needs, and then transferred for treatment to Winnipeg (Lavallee, 2005). While provinces are responsible for health care and child and family services, the federal government has responsibility to fund services to First Nations children on reserve. However, there have been ongoing disputes between Manitoba and the federal government for over a decade about payment of costs for First Nations children on reserve in the care of child welfare services, and continuing federal efforts to reduce funding costs for on-reserve First Nations children (Lavallee, 2005). Due to federal-provincial jurisdictional dispute, five year-old Jordan died in hospital without having known a family environment. Lavallee (2005, 527) explains: “The tragedy is that he did not have to stay in hospital for medical reasons: he remained there for [a further] two years because the government departments could not settle on which one would pay for his foster home care”.

Consequently, numerous organizations, spearheaded by First Nations Child and Family Caring Society, enunciated ‘Jordan’s Principle’, which outlines that the jurisdiction in which a First Nations child is treated is the jurisdiction that will pay; and disputes over funding are to be settled once the child’s needs have been fully met. This Principle is affirmed as “a child first principle”, which “applies to all government services available to children, youth and their families” (FNCFC, 2007). An editorial in the *Canadian Medical Association Journal (CMAJ)* endorsed ‘Jordan’s Principle’ and the authors, MacDonald and Attaran (2007), referred to the CRC and “the best interests of the child” to conclude that Canada was in contravention of the Convention and had discriminated against Jordan. The editorial recommended court action against governments ignoring ‘Jordan’s Principle’.

Other First Nations children however, continue to suffer due to bureaucratic disputes. For example, 37 families from Jordan’s reserve were informed in March 2007 that their children with disabilities would no longer receive funds for their professional and support services in their community, which means that these families are in effect forced to send their children away for health care (MacDonald and Attaran). In a major 2007 report for the federal department of health, Dr. Kellie Leitch (9) urges the government to apply Jordan’s Principle so that health care requirements of aboriginal children are met regardless of the jurisdiction. In response to public support, the House of Commons unanimously passed a private member’s motion in support of the Principle on 12 December 2007. Yet, the problem continues in Canada as the First Nations Child and Family Caring Society highlighted in May 2010 that another child was placed into care for the same reason. Hence, while there are many words supporting the principle, there is little government action across the country at federal and provincial levels (Blackstock). The principle is not only relevant for service provision but also for monitors.

If utilized effectively, Jordan's Principle can guide monitoring efforts for Aboriginal and other children. For example, a 2009 conference revealed assessments of both the Principle's positive impact for Aboriginal children in Manitoba as well as the lack of consideration, which has led to negative effects for their health in other parts of the country. Moreover (Canadian Coalition for the Rights of Children 2009a, 21):

“Jordan's Principle is relevant beyond Aboriginal children. Recent reports by provincial children's advocates in New Brunswick, Ontario, Saskatchewan, and British Columbia all provide documentation of children in need who fall between the cracks of different government departments within provincial governments or gaps between federal laws and provincial services in the case of juvenile justice. If the BIC [best interests of the child] was a higher priority, there would be a significant reduction in cases of children falling through the cracks.”

Jordan's Principle can ensure that the focus of monitoring is on the child, his/her rights and access to services, not on the government institutions. In this way, the situation and experiences of the child are revealed and assessed. Consequently, not only is there an urgent need to strongly push for application of Jordan's Principle in relation to Canadian monitoring, inadequate action in relation to this principle illustrates how far the country has yet to progress in terms of understanding and supporting children and their rights.

Attention to monitoring

Monitoring should be taken seriously and be informed by child rights and a child rights-based approach. Canadian government reporting to the UNCRC for instance is not simply an administrative exercise that reflects jurisdictional boundaries as a child experiences his/her rights across jurisdictions in Canada as Jordan's Principle affirms. The child and his/her rights are not the focus of current monitoring efforts as revealed in: weak coordination; and the need for increased resources. Moreover, if they are not yet doing so, NGOs and other civil societal actors must develop and rely on knowledge base from research and analysis guided by child rights. Adults may be well-meaning in attempting to serve child needs, but their monitoring efforts may not reflect the child's right to development, or evolving capacities, or may neglect discrimination, which also inhibits child participation. Thus, efforts must be revamped focussing on child rights.

Need for greater child rights awareness

Of critical importance is the need for greater child rights awareness, training and education in Canada. This was a conclusion of a major study of CRC general measures in Canada (Pearson and Collins, 2009). Too few people know about child rights in this country. One young person enunciated that

more awareness is needed, in particular: “Parents need to be informed of children’s rights as well, this will help kids rights to be respected and met in daily life.”(qtd. in Landon Pearson Resource Centre, 6).

Conclusion

Child rights are challenging, demanding changes in society and to relationships, actors and processes. Indeed, determining the child’s best interests can be difficult but this principle both inspires and demands progress. Although many challenges remain, the best interests principle should influence monitoring efforts so that this process, with the support of children themselves, can better respect children and their rights as well as be more effective.

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